

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1809

Cir. Ct. No. 2015SC5951

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

NAYTHAN A. SCHWAB,

PLAINTIFF-APPELLANT,

V.

LEVI M. WEBB, JR.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
ELLEN R. BROSTROM, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Naythan A. Schwab, *pro se*, appeals an order of the circuit court dismissing his action against Levi M. Webb, Jr., without prejudice.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Because there is no evidence in the record that the defendant was ever served with the complaint, we affirm the circuit court.

BACKGROUND

¶2 The record indicates that all times material to the appeal, Schwab has been incarcerated. On March 30, 2015, Schwab filed a small claims against Webb. The complaint alleged that while Schwab was incarcerated, Webb stole Schwab's car by forging Schwab's signature on the title to the vehicle. Schwab sought damages in the amount of \$3500 and/or the return of his car.

¶3 The complaint alleged that Webb lived at an address on South 3rd Street in Milwaukee. A later document, filed with the Clerk of the Circuit Court on August 12, 2016, requested that the Milwaukee County Sheriff serve "Case number 15-SC-5951" "to Levi Webb JR who is incarcerated at the John C. Burke Correctional Center in Waupun, WI." It is unclear what exactly Schwab attempted to serve Webb.

¶4 The case was dismissed at the small claims level and ultimately dismissed at the circuit court level. The circuit court found that Schwab failed to provide any proof that he actually served Webb with a complaint and it denied Schwab's request for a telephonic trial, noting the difficulties with taking evidence and assessing witness credibility over the phone.

¶5 We agree with the circuit court. The record contains no proof that a small claims summons and complaint was ever served upon Webb. WISCONSIN STAT. § 801.11 governs personal jurisdiction and service of process. The statute requires that personal service under § 801.11 be attempted with "reasonable diligence" before an alternative method of service is employed. *Loppnow v.*

Bielik, 2010 WI App 66, ¶10, 324 Wis. 2d 803, 783 N.W.2d 450. Without evidence from which the circuit court could reasonably conclude that Webb was properly and timely served and without evidence that Schwab exercised reasonable diligence in attempting to serve Webb, the circuit court had no authority to proceed with the action.²

¶6 Accordingly, we affirm the circuit court's order dismissing Schwab's action without prejudice for lack of personal jurisdiction.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

² Schwab includes a certified mail receipt indicating that something was sent to the Milwaukee Secure Detention Facility. The receipt indicates that whatever was sent was indeed received. We note that we cannot consider items contained in an appendix but not contained in the record. *State v. Smith*, 100 Wis. 2d 317, 322, 302 N.W.2d 54 (Ct. App. 1981), *overruled on other grounds by State v. Firkus*, 119 Wis. 2d 154, 350 N.W.2d 82 (1984).

